United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 952

Case No. 1058: HAMAD

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas at the request of Imad Hussein Hamad, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 December 1998, the Applicant filed an application containing pleas which read as follows:

"***SECTION II PLEAS***

Applicant prays the esteemed Tribunal to ...:

a. [Rescind the] decision of the Commissioner-General, and [order] his reinstatement to duty.

b. [Consider the] period of cessation [as] special leave with full pay.

c. [Order] compensation for injury sustained, including libel and slander exercised by [the] Respondent.

d. Should [the] Respondent refrain from reinstating [the] Applicant, ... order payment of salaries plus interest until the date of enforcement of judgement.

e. [Order] payment of secretarial and counseling fees."

Whereas the Respondent filed his answer on 8 August 1999;

Whereas the Applicant filed written observations on 22 September 1999;

Whereas the Applicant submitted further comments on 3 May 2000;

Whereas, on 26 June 2000, the Respondent submitted written comments on the Applicant's written observations;

Whereas, on 6 July 2000, the Applicant filed an additional document and on 24 July 2000 the Respondent commented thereon;

Whereas, on 15 July 2000, the Applicant submitted written comments on the Respondent' s submission of 26 June 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 11 September 1995, as an Area staff member on a three-year fixed-term appointment, in the capacity of Teacher (Arabic, Religion), Joura School, Damascus Area, Syrian Arab Republic (SAR). His appointment was subject to an initial period of probationary service of 12 months duration. The Applicant's probationary appointment was terminated effective 10 April 1997.

On 16 October and 20 November 1995, a School Supervisor from the Department of Education, UNRWA, SAR, after reviewing the Applicant's performance, gave him a rating of "Average" (3 in a scale of 1 to 7, where 7 is highest) in his report. In two further reports dated 12 February and 28 March 1996, the Applicant was again rated "Average"; however, the School Supervisor had added remarks to the effect that the Applicant was conscientious, cooperative, accepted instructions and acted thereupon.

On 10 May 1996, the Area Education Officer (AEDO) sent a letter of reprimand to the Applicant stating that based on the School Supervisor's reports he noted that the Applicant's' competence, efficiency, and educational performance were weak, that his educational results were low and that he was not responsive to instructions aimed at developing his abilities. On 25 September 1996, the Chief, Field Education Programme, SAR, sent another letter of reprimand to the Applicant for poor performance.

On 9 October 1996, the Applicant's first periodic report was completed by his supervisors. His overall rating was "a staff member who maintains only a minimum standard of efficiency", and at the end the AEDO had added a comment to the effect that the Applicant was an "Unsatisfactory teacher". Deferral of the Applicant's annual salary increment for six months was recommended. On 23 October 1996, the Field Personnel Officer, SAR, notified the Applicant that in view of his periodic report and the comments contained therein, it had been decided to defer his annual salary increment (due 1 October 1996) for a period of six months. A new periodic report would be prepared on 1 April 1997. On 6 November 1996, the Chief, Field Education Programme sent a memorandum to the Applicant following a class visit, urging him to exert efforts to step up his technical and professional competencies.

On 3 March 1997, a different School Supervisor rated the Applicant's performance "Average", while remarking that he was "... a responsive teacher who has language competencies that he uses well in class situations." However, the AEDO had added on the report that "the standard of the teacher is weak and he does not deserve the evaluation given to him by the School Supervisor."

The Applicant's second periodic report was completed on 20 March 1997. His overall rating was again "a staff member who maintains only a minimum standard of efficiency" and the report once more included the comment "Unsatisfactory teacher". Another deferral of his annual increment for six months was recommended. On 6 April 1997, the School Supervisor wrote a memorandum to the AEDO recommending deferral of the Applicant's annual salary increment "based on the shortcomings [he] witnessed along with everybody ..."

On 7 April 1997, the AEDO, in a memorandum to the Chief, Field Education Programme recommended termination of the Applicant's appointment. On 8 April 1997, the Director of UNRWA Affairs, SAR, informed the Applicant of the decision to terminate his appointment effective 9 April 1997, under paragraph 10 of his Category "X" letter of appointment, which specified that a probationary appointment may be terminated by the Agency at its sole discretion and without notice at any time during the probationary period.

Subsequently, the Applicant wrote a memorandum to the Director of UNRWA Affairs which was received 27 April 1997, in which the Applicant requested him to review the decision to terminate his appointment. On 11 May 1997, the Officer-in-Charge, UNRWA Affairs, responded to the Applicant and informed him that after reviewing the decision, he saw no reason to change it.

On 25 May 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 25 March 1998. Its evaluation, judgement, and recommendation read, in part, as follows:

> "**III. EVALUATION AND JUDGEMENT**
>
> 17. ....
>
> (a) The Board noted that all school supervisor's reports rated the Appellant average, conscientious, cooperative, tends to improve his professional skills and not weak, also the last school supervisor's report which [was] dated 3/3/97 rated the Appellant average +, receptive, responsive teacher possesses linguistic competencies which he properly uses in class situations, which is a sign that the Appellant is showing improvement.
>
> (b) The Board noted the school supervisor's remarks about the position of the teacher dated 6/4/97, which stated 'I paid him two class visits when he showed some performance progress in carrying out class period'".
>
> ...

(d) The Appellant should be treated as a confirmed staff member as the probation period should not in any circumstances exceed eighteen months (PD/A4/Part VII/9.1) while he spent around 19 months (11 September 1995 - 9 April 1997).

(e) In this context, the Board is of the opinion that the Administration could have taken into consideration his improvement before terminating him.

IV. RECOMMENDATION

18. In view of the foregoing ..., the Board by majority vote makes its recommendation that the Administration's decision be reviewed."

One JAB member filed a dissenting opinion, which read, *inter alia*, as follows:

"DISSENTING OPINION OF BOARD MEMBER ...

- I disagree with the Board in that the Appellant received several letters of reprimands and did not object to them.

- The Appellant had two unsatisfactory periodic reports.

- I am of the opinion that the improvement which the Appellant showed was not within the required standard.

- In view of the forgoing, I recommend that the appeal be dismissed."

On 29 April 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, in part, as follows:

"...

I have carefully considered the report and the majority recommendation. I am inclined to accept the recommendation that the administrative decision be reviewed, and I have conducted such review. Having done so, I am of the view that there was a reasonable basis for determining that your performance as a teacher was unsatisfactory and for terminating your employment with the Agency. I do not find the

school supervisors' reports persuasive, and note that the numerical ratings contained therein are not impressive. Moreover, both periodic reviews rate your performance as unsatisfactory. Consequently, I am not prepared to reinstate you. I believe, however, that you are entitled to 30 days salary in lieu of notice of termination, and by copy of this letter I so instruct the Administration.

..."

On 30 December 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's services was based on inconsistencies, mistake of fact and error of law.

2. The decision was not based on poor performance or lack of technical skills, but motivated by prejudice.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the services of the Applicant was based on his continued unsatisfactory performance and was made in conformity with the terms of his appointment and the relevant regulations and rules.

2. It was within the discretion of the Agency to terminate the services of the Applicant for unsatisfactory performance. The Agency did not abuse its discretion and the termination of the Applicant was not based upon any prejudice or bad faith.

The Tribunal, having deliberated from 12 to 28 July 2000, now pronounces the following judgement:

I. The Applicant joined UNRWA effective 11 September 1995. His probationary appointment was terminated effective 10 April 1997, exceeding the maximum period of eighteen months, stipulated in personnel directive A/4/Part VII/Rev.7, paragraph 9.1 and specified in his letter of appointment, by seventeen days.

II. The Tribunal, first, must determine the legal consequences of the fact that the Applicant had exceeded his probationary period, as the Agency did not reserve its rights, and the deadline passed without any action on the part of the Agency. Is this enough to make him a confirmed staff member?

III. Should the Tribunal find that this was not the case, it must determine whether the Applicant's separation from service under paragraph 10 of his letter of appointment after the stipulated deadline was within the discretion of the Agency and not in violation of the Agency's Regulations and Rules.

IV. With regard to the first issue, the Tribunal is satisfied that the mere fact that the Applicant's probationary service exceeded the maximum period by close to a month does not in and of itself mean that his appointment was confirmed. Thus, the Applicant was still on probation at the time he was separated from service. The Tribunal gives the following reasons:

(i) In the first place, if it had been the intention of UNRWA that probationary appointments would be confirmed without any action on the part of the Agency upon the first day following the maximum probation period of eighteen months, this would have been set out in the Regulations and Rules. This is not the case. Even though the Personnel Directive states that "the total period of continuous probation shall not in any case exceed eighteen months", it does not say that if that period is exceeded, a staff member is automatically confirmed; and,

(ii) In the second place, and perhaps more importantly, paragraph 11 of the same Personnel Directive establishes that "in all circumstances satisfactory completion of

probationary service is a condition of confirmation of appointment". This then is the real and substantial condition for confirmation whereas the setting of a maximum probationary period seems rather in the nature of an instruction to the Administration so that staff on probation would not remain so for unduly long periods, awaiting a final decision on their employment status.

V. The question then is whether or not the Applicant had completed his probationary period to the satisfaction of the Agency.

VI. The Agency has a wide discretion to determine whether the performance of a staff member is satisfactory, and, if it finds that this is not the case, to terminate the staff member's services for that reason. However, as the Tribunal has consistently held, such discretion is limited. The Agency should act in good faith, follow due process, and ensure that its decisions do not suffer from arbitrariness or improper motivation.

VII. At the same time, the Tribunal has held that the burden of proving improper motivation or prejudice lies with the party who makes the allegations. In the present case, the Tribunal finds that the Applicant has not brought convincing proof that the decision to terminate his services for unsatisfactory performance was biased or improperly motivated. On the contrary, there is ample evidence of the Applicant's unsatisfactory performance. Even though the first School Supervisor gave him an overall rating of "Average" and included in his report encouraging remarks, his successor recommended to the AEDO that the Applicant's annual increment be deferred based on his shortcomings. The AEDO noted that the standard of the Applicant was "weak" and that he did not deserve the evaluation given to him by the School Supervisor. The Applicant's periodic reports rated him as a staff member "who maintains only a minimum standard of efficiency", included the comment that he was an "unsatisfactory teacher", and recommended that his annual increment be deferred. In addition, he was given

two written reprimands by the Chief, Field Education Programme, SAR, advising him to "step up his technical and professional competencies". Finally, the Field Personnel Officer, SAR, wrote to the Applicant on 23 October 1996, listing his numerous shortcomings, and advised him that his annual increment would be deferred.

VIII. On 8 April 1997, the Director of UNRWA Affairs, SAR, informed the Applicant that his second periodic report had indicated that he "was not industrious", that he tended "to fall behind" in his work and that his performance was "uneven". Accordingly, he decided to terminate the Applicant's services effective 9 April 1997, under paragraph 10 of his letter of appointment.

IX. The Tribunal is satisfied that in the exercise of his discretion to terminate the Applicant's employment, the Respondent was not guided by any improper motive. The decision was not arbitrary and did not violate due process of law. In the exercise of that same discretion, the Respondent had a number of reports before him: those of the School Supervisor, which were slightly more favourable to the Applicant and those of the AEDO and the Chief, Field Education Program, SAR, which were less so. The Tribunal can find no improper motivation in the decision by the Director of UNRWA Affairs, SAR, to give more weight to the reports from the United Nations staff members, which, doubtless, were considered by him as better reflecting the real qualities – or if preferred, the real defects - of the Teacher. The Tribunal is satisfied that the Director used his discretion within the permitted limits.

X. For the foregoing reasons, the Tribunal rejects the application its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary